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IN THE

Supreme Court of the United States

October Term, 1965.

No. 435.

HERMAN BERMAN, Individually and Trading as SCOTT CONSTRUCTION COMPANY, et al.,
Petitioners,

v.

SEYMOUR HERRICK and ABRAHAM KAMBER, Individually and Trading as LEWIS TOWER BUILDING,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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September 3, 1965.

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OPINIONS BELOW.

The opinion of the District Court is reported at 231 F. Supp. 918. The opinion of the Court of Appeals for the Third Circuit (App. of Petition) is reported at 346 F. 2d 116.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED.

1. In a trial without a jury does the refusal of the Court of Appeals to consider the procedural question of the proper exercise by a district court of its discretion in stopping cross-examination of one of defendants' witnesses, constitute fundamental error where the Court of Appeals' decision is based on another valid and totally independent ground.

2. Did the Court of Appeals properly apply the Pennsylvania decisional law as to damages in an unjust enrichment case to the facts of this case.

STATEMENT OF THE CASE.

This is a diversity action between contractors and materialmen and the owners of a Philadelphia office building (R. 221a). The plaintiff-petitioners supplied labor and material to L. T. B. Company, a Pennsylvania corporation, which was the tenant of the Lewis Tower Building, an office building in Philadelphia (Petition, p. 14). They had no agreements of any kind with the defendants-respondents Seymour Herrick and Abraham Kamber who were then the owners of the building, nor did they rely upon them in any way (R. 221a, 228a, 229a). Nevertheless, plaintiffs attempted in this law suit to impose liability on the defendants for tenant-L. T. B.'s debts under the theory of unjust enrichment (Petition, p. 3).

The case was tried by a court without a jury. The district court found no proper factual basis for the claim that the landlord-defendants had been unjustly enriched by the work done on their building by the plaintiffs at the request of the tenant, L. T. B. Company, and in sole reliance upon its promise to pay (Petition, p. 15). The district court expressly refused to find that the conduct of an individual who was both a limited partner of the defendants

and a stockholder and participant in the activities of the corporate tenant, L. T. B. Company, provided an equitable basis for imposing liability on the defendants for any benefit they derived from plaintiffs' work (R. 226a, 227a, 228a).

On appeal to the Court of Appeals for the Third Circuit, plaintiffs contended that the district court's findings were erroneous and that the district court committed error in stopping cross-examination of one of defendant's witnesses. The Court of Appeals unanimously affirmed the judgment of the district court, basing its decision on the ground that plaintiffs' proof on the issue of enrichment was insufficient to sustain an award of damages. The Court of Appeals expressly declined to consider the underlying equities of the case; having found no enrichment it was unnecessary to decide whether an injustice would result if recovery was denied.

ARGUMENT.

Plaintiffs seek review in this Court of two questions:

(a) First, they contend that the Court of Appeals sanctioned fundamental error committed by the district court in halting the cross-examination of a "crucial witness";

(b) Secondly, they contend that the Court of Appeals ignored the entire line of decisions in the Commonwealth of Pennsylvania dealing with unjust enrichment.

It is obvious that both of these contentions relate solely to the conduct of the instant trial and to the facts presented in that trial. The applicable cases make it clear that the determination as to the proper latitude to be allowed to counsel on cross-examination and the application of the doctrine of unjust enrichment depend—although in different ways—upon the particular facts of the individual case.

1. Cross-Examination.

This Court has held that "the extent of cross-examination. . . is within the sound discretion of the trial court." *Alford v. United States*, 282 U. S. 687, 694, 51 S. Ct. 218, 220 (1931). Under *Alford* and the cases following it, the test to be applied is whether a district court has abused its discretion. While recognizing this principle, plaintiffs argue that the trial court "exceeded all proper limitation of cross-examination by prohibiting all further cross-examination of a witness . . ." (Petition, p. 8). Examination of the record belies this assertion.

The witness in question was Arthur Feinstein, a witness for the defendants. He was asked seven questions covering two pages on direct examination (R. 181a-182a).

His cross-examination covered four subjects and twenty-eight pages of the record (R. 182a-209a). After these subjects were explored in minute detail, the district court ended the cross-examination (R. 209a). On re-cross-examination one question was asked which was obviously a continuation of plaintiffs' original cross-examination (R. 210a). Further cross-examination was stopped by plaintiffs' counsel on his own initiative.

Although plaintiffs now assert, and asserted in the Court of Appeals, that Mr. Feinstein's credibility was a crucial issue in the case, no factual basis for this assertion appears either in the record, in plaintiffs' brief in the Court of Appeals, or in their Petition to this Court. In view of the repetitious nature of the cross-examination and the failure of plaintiffs' counsel to indicate to the trial judge that other areas of inquiry had not yet been explored, the district court's ruling was clearly correct.

More importantly, the Court of Appeals did not rule on the issue to which this cross-examination was directed. While plaintiffs read the Court of Appeals' opinion as an admission that fundamental error was committed by the district court, its opinion is not susceptible of that interpretation. The Court of Appeals stated:

> "We agree with the defendants that the plaintiffs' proof on the issue of enrichment was insufficient to sustain an award of damages and, therefore, we find it unnecessary to consider the underlying equities of the case." (Petition, p. 15)

The Court's statement should be taken at face value. Its failure to consider any issue but that of enrichment and of evidence presented in connection with that issue cannot be equated with an expression of opinion on any other issue and certainly cannot be construed as an adverse opinion. It would be a useless expenditure of judicial time for this Court to review an issue which was unnecessary to the decision below.

2. Conflict With State Law.

The plaintiffs have asserted that the Court of Appeals' decision is in such conflict with applicable Pennsylvania decisions as to destroy the law of unjust enrichment as enunciated by the Pennsylvania courts (Petition, p. 6). This assertion is not supportable.

The Pennsylvania Supreme Court has held that in order for a plaintiff to recover on the theory of unjust enrichment, he must prove both enrichment and an injustice resulting if recovery for the enrichment is denied. *Meehan v. Cheltenham Township,* 410 Pa. 446, 449, 189 A. 2d 593, 595 (1963). The "enrichment" is measured not by the plaintiff's loss nor by the value of labor and material expended by plaintiff, but by the benefit received by the defendant. *Meehan v. Cheltenham Township, supra* at 450, 189 A. 2d at 595-96; *West v. Peoples First National Bank & Trust Co.,* 378 Pa. 275, 286, 106 A. 2d 427, 433 (1954). Applying this principle to the testimony in this case, the Court of Appeals held "that the plaintiffs' proof on the issue of enrichment was insufficient to sustain an award of damages" (Petition, p. 15); "there was no evidence of any amount or amounts by which the value of the [defendants'] building was increased as a result of any of these [plaintiffs'] undertakings" (Petition, p. 16).

Plaintiffs dispute the Court's reading of Pennsylvania law. They argue that plaintiffs may recover the amount reasonably charged by them for their work irrespective of the benefits received by the defendants. They claim that this is the appropriate rule to be applied by reason of a footnote in the *Meehan* case, *supra,* and the Restatement section cited in this footnote. From these sources the plaintiffs argue that the rule applied by the Court of Appeals is not applicable in this case.

The footnote and the Restatement section cited both indicate that the amount of recovery *may* be measured by the value of the plaintiffs' work *if* the recipient is guilty of fraud or breach of contract. In that event—and only in

that event—would the value of labor and material supplied by plaintiffs be relevant. There is no dispute as to the existence of this principle. However, in order for it to apply plaintiffs must have proved either breach of contract or fraud. Since there was admittedly no contract between the plaintiffs and the defendants (Petition, p. 3), plaintiffs cannot rely upon breach of contract. Although plaintiffs alleged in their complaints that defendants were parties to a scheme to have plaintiffs improve their building, there was no proof presented by plaintiffs to support this allegation and the district court categorically refused to so find. Furthermore, it held "there is no basis for imputing to the defendants knowledge of, or acquiescence in, this [L. T. B.'s] overambitious program of improvements" (R. 228a).

This case involves solely the application of the general principles of the doctrine of unjust enrichment as laid down by the Pennsylvania courts to the particular facts of this case. Indeed the Pennsylvania courts have stated that: "On questions of this nature [unjust enrichment] no two cases are alike. Each case rests upon its own peculiar facts and the general principles relative thereto." *Farmers National Bank v. Albertson,* 203 Pa. Super. 205, 211-12, 199 A. 2d 486, 489 (1964).

Plaintiffs' argument, in substance, is no more than that this case was improperly decided on its facts. This is confirmed by the final assertion in plaintiffs' argument where they contend that they submitted in detail proof of their damages conforming to the standards set forth in previous Pennsylvania decisions (Petition, p. 12). The Court of Appeals held to the contrary.

The doctrine applied by the Court of Appeals is directly and correctly drawn from the applicable Pennsylvania decisions. The determination by the Court of Appeals on questions of local law has ordinarily been accepted by this Court. *General Box Co. v. United States,* 351 U. S. 159, 165, 76 S. Ct. 728, 732 (1956); *Ragan v. Merchants*

Transfer & Warehouse Co., 337 U. S. 530, 534, 69 S. Ct. 1233, 1235 (1949). It should be accepted here and certiorari should not be granted. Cf. *Wolf v. Weinstein*, 372 U. S. 633, 636, 83 S. Ct. 969, 972 (1963).

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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September 3, 1965.